

STATE OF NEW YORK
COUNTY OF SCHOHARIE

COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

- against -

NAUMAN HUSSAIN,

Defendant.

DECISION/ORDER
Indictment No. 2019-33

The People apply for an order directing the defendant “to submit to the taking of saliva and buccal cell samples from his body.” The defendant opposes this motion.

Defendant has been indicted for 20 counts of Manslaughter in the Second Degree (Penal Law §125.15) and 20 counts of Criminally Negligent Homicide (Penal Law §125.10). The charges emanate from an October 6, 2018 motor vehicle crash that occurred in Schoharie County, New York, that caused the death of 20 people.

The indictment alleges that, with respect to the manslaughter charge, the defendant “recklessly caused the death” of each deceased person; and the indictment alleges that, with respect to the crime of criminally negligent homicide, defendant “with criminal negligence, caused the death” of each of the deceased individuals. (Emphasis supplied).

People's Argument

In support of this application, the District Attorney argues that:

5. On October 6, 2018, members of the New York State Police commenced investigating the fatal limousine crash described above (hereinafter "the Investigation").
6. The Investigation revealed that a white Ford Excursion limousine, bearing New York State licence plate TOGALUXI and VIN number 1FMNU40S51EB10299 (hereinafter "the Limousine"), operated by Scott Lisinicchia and occupied by seventeen passengers, was traveling south on State Route 30 in the Town of Schoharie, Schoharie County, New York. The limousine crossed through the intersection with State Route 30A, exited the road, struck a parked vehicle in the parking lot of the Apple Barrel Restaurant and Gift Shop, the parked vehicle struck two pedestrians and then the limousine struck an earth embankment. All occupants of the limousine including the driver, as well as two bystanders, suffered fatal injuries.
7. On October 6, 2018, I am informed that a member of the NYSP performed a query of the New York State Department of Motor Vehicles (DMV") for NY registration for TOGALUXI. The result showed "Shahed Hussain DBA PRESTIGE LIMO&CHAUF" as the registered owner of the limousine, with an address of 776 State Route 9, Gansevoort, NY 12831.
8. NYSP Investigator Erika Hock informs me that she conducted a Google search for the company Prestige Limousine in Gansevoort, NY on October 6, 2018. A business phone number was listed as 518-306-7663. Investigator Hock called the number and spoke to a person who identified himself as Nauman Hussain, who stated that he was running the business while his father Shahed Hussain was out of the country. Nauman Hussain further stated that he took a last-minute booking from Axel Steenberg the morning of October 6, 2018 around 9:00 a.m. He provided Investigator Hock an address in

Amsterdam as the pickup location and stated that the limousine booking was made for the transport of 16-18 people and that the driver of the limousine was Scott Lisinicchia.

9. On October, 2018, NYSP Senior Investigator Michael Burns spoke with Nauman Hussain, who stated he is the manager of Prestige Limousine and Chauffeur Service located in Gansevoort, NY. He stated his father Shahed Hussain is the owner of Prestige Limousine and Chauffeur Service and is currently overseas. Nauman Hussain stated he is in charge of running the business until his father returns. On October 6, 2018, at approximately 8:56 a.m., Nauman Hussain was contacted by a person who identified himself as Axel Steenburg, who was inquiring about renting a limousine for the day. Nauman Hussain stated that Axel Steenburg advised him that his party wanted to rent the limousine for a trip to the Ommegang Brewery in Cooperstown, NY as well as other places they wanted to go. Axel Steenburg told Nauman Hussain that he would advise the driver through the course of their trip about the locations of the other establishments. Nauman Hussain and Axel Steenburg agreed to a price. Axel Steenburg provided an address in Amsterdam, NY as the pickup point. Nauman Hussain then contacted one of the drivers, Scott Lisinicchia, for his availability and Scott Lisinicchia agreed to take the job. Nauman Hussain sent a text message and advised Scott Lisinicchia of the trip details and the customer name. Scott Lisinicchia responded that he would pick up the car.
10. Several witnesses at the scene observed the limousine crash into the embankment.
11. I am informed by NYSP Investigator David Burns, on October 10, 2018, he interviewed Chad Smith, who is employed by the New York State Department of Transportation (hereafter "DOT"), Motor Carrier Passenger Safety Bureau, as an Intermodal Transportation Specialist 1, about several encounters he had with the limousine and the "motor carrier", who was identified by him as Nauman Hussain. See Exhibit A

annexed hereto and made a apart [sic] hereof, supporting deposition of Chad Smith.

12. Mr. Smith stated that on or about June 8, 2017, he was at Mavis Tire on Route 9 in Saratoga Springs, NY, when he observed the limousine parked in the parking lot. Mr. Smith observed that the vehicle had a livery license plate which normally would indicate the vehicle would transport passenger for hire. It caught Mr. Smith's attention because due to the vehicle's size, it would require NYS DOT authority to operate. Mr. Smith ran the registration in the Department of Motor Vehicles (hereinafter "DMV") database and the registration had the vehicle listed as an 11-passenger vehicle. Mr. Smith checked and found that the limousine had been previously inspected by DOT and it was listed as an 18-passenger vehicle. Through further online checks, Mr. Smith found a connection to Hasylimousine@yahoo.com.
13. Due to the information Mr. Smith gathered, he contacted the company via email on June 9, 2017 to advise that they would be required to contact DOT and get proper authority to carry passengers for hire. He also included information on how to comply with NYS DOT and Federal Commercial requirements. Mr. Smith did not receive a reply to that email. On or about June 26, 2017, he checked the DOT databases and found the carrier had not applied for DOT authority. Mr. Smith then forwarded this information to Martin Duffy, a DOT Investigator. Mr. Smith became aware that a Notice of Violation was issued to the company.
14. Mr. Smith stated that on or around January 5, 2018, he checked the internet for unauthorized carriers. During these checks, he came across the website SaragoaLuxuryLimo.com, which was offering passenger transportation for hire. He then checked Facebook for Saratoga Luxury Limousine and found information offering for hire transportation and a photo of the limousine that he recalled from his previous encounter. Mr. Smith ran DMV checks to get updated information and then

contacted the company via the email address info@saratogaluxurylimo.com. An individual responded with a quote of five hours for 13 people that would cost \$695 plus tax and tip. Based on that information Mr. Smith issued a Notice of Violation, #8320, to Shahed Hussain, the registered owner of the vehicle as of January 8, 2018. Mr. Smith issued this notice via U.S. Postal Service because the carrier did not have DOT authority.

15. On January 8, 2018, Mr. Smith called the phone number listed on the website and in the email. The person who answered the phone identified the company as Saratoga Luxury Limo. Mr. Smith asked for "Shahed" and the person responded in the affirmative. The individual was then notified of the issuance of a Notice of Violation based upon the availability of the limousine for commercial passenger use. An appointment was made to conduct a terminal inspection and a follow up email was sent to the carrier to confirm this information. In the follow up email the inspection was scheduled for Friday January 12, 2018. Mr. Smith also sent information on how to obtain DOT authority. Each time Mr. Smith corresponded with the carrier, the individual answering said that he was Shahed Hussain.
16. Mr. Smith experienced some difficulty getting the carrier to permit him to inspect the limousine, but he ultimately scheduled the inspection for March 21, 2018 at noon. On that date, Mr. Smith went to 68 Waybill Avenue in Saratoga Springs and introduced himself to the carrier, who purported to be Shahed Hussain. Mr. Smith found the limousine and two other tan stretch limousines on the property and was able to complete the inspection of the limousine.
17. The inspection resulted in a number of commercial vehicle violations, which included four violations that are considered out of service, according to federal guidelines. Those violations included: No or defective bus emergency exists; more than 25% of brakes defective; operating a motor coach or

other passenger carrier vehicle with seating in excess of the manufacture seating capacity (because the final Federal Motor Vehicle Safety Standards (hereinafter "FMVSS") sticker was missing the vehicle was specified as no more than a ten-passenger vehicle"; and a hydraulic brake line, by axle one, left side was dangling and able to make contact with the front left tire.

18. In addition to the four out of service violations Mr. Smith found an additional ten non-out of service violations, which included some regulatory issues (state operating authority violations, state vehicle or license plate violation, no USDOT number, USDOT number not displayed, operating a commercial motor vehicle without proof of periodic inspection, carrier not certified through New York State DMV 19a Bus driver Unit), and some mechanical issues (deterioration of B-post on left side of frame, ABS light remained on while vehicle was in operation, a vice grip was placed on the hydraulic tube, axle number two left side, and vehicle was missing final FMVSS label).
19. Mr. Smith placed the vehicle Out of Service by placing an out of service sticker on the vehicle.
20. Between June and late August, 2018, Mr. Smith determined that the Department of Transportation had not been notified of that the out of service violations had been corrected. Mr. Smith scheduled another inspection on September 4, 2018.
21. During this inspection, on September 4, 2018 Mr. Smith met with the carrier at 68 Waybill Ave. Saratoga Springs. He asked him, "Shahed Hussain?" And the defendant responded "yes." Mr. Smith asked him who was Nauman Hussain and he responded, "It is me." Mr. Smith asked him who Shahed Hussain was and he responded, "he is my father." Every physical interaction which Mr. Smith previously thought was with Shahed Hussain, including the March 21, 2018 encounter, he now knew was with the defendant. He asked the defendant

for further clarification for the business and he told Mr. Smith "Prestige Limousine." Mr. Smith asked the defendant if it was a DBA and he stated it was under Shahed Hussain. He stated it was a sole proprietorship. Mr. Smith asked if he had the authority to act for Shahed Hussain and he indicated that he did. Mr. Smith then proceeded with the inspections.

22. Mr. Smith completed an inspection on the limousine, which resulted in a number of commercial vehicle violations, including three violations that are considered out of service violations according to federal guidelines. These violations were: No or defective bus emergency exits; operating a motor coach or other passenger carrier vehicle with seating in excess of the manufacture seating capacity (due to the final FMVSS sticker was missing the vehicle was specified as no more than a ten-passenger vehicle); and ABS line by axle one, left side, was dangling and able to make contact with the front left tire. In addition to the three out of service violations, Mr. Smith found an additional ten non-out of service violations, which included some regulatory issues (state operating authority violation, state vehicle or license plate violation, USDOT number not displayed, operating a commercial motor vehicle without proof of periodic inspection, carrier not certified through New York State DMV 19a Bus driver Unit; failure to correct defects in previous inspection report) and some mechanical issues (deterioration of B-post on left side of frame, ABS light remained on while vehicle was in operation, vehicle missing final FMVSS label, windshield washer reservoir empty). Mr. Smith stated that he personally communicated the inspection results to the defendant on September 4, 2018.
23. Once again, Mr. Smith placed the vehicle out of service by placing an out of service sticker on the limousine. Mr. Smith also placed out of service stickers on two other limousines he inspected that day.
24. Despite repeated further contacts with the defendant, neither the Department of Transportation or Mr. Smith were never [sic]

informed that the defendant had complied with DOT requirements, or repaired the conditions that led to the limousine being placed out of service. The defendant continued to fail to comply with DOT requirements, even when told on September 6, 2018 that the registration of his vehicles were scheduled for suspension.

25. The day before the crash and deaths of the twenty victims, on October 5, 2018, Mr. Smith called the defendant to report that he had not received requested DBA documents and required drug and alcohol testing information. The defendant told Mr. Smith he would send it by October 10, 2018. This was Mr. Smith's last interaction with the defendant.

The defendant's arrest and search of his Infiniti vehicle

26. I am informed by New York State Police that on October 10, 2018, the defendant, his brother and his girlfriend were present in an Infiniti Q56 vehicle (hereafter the "Infiniti"), registered in the defendant's name. The defendant was placed under arrest and the Infiniti was towed to the NYSP.
27. On October 19, 2018, this Court issued a search warrant for, among other things, "An Apple I-Phone X cell phone listed as item number E109; An Apple-IPhone I Plus cell phone listed as item number E110; a 2019 Infinity [sic] Q56, bearing New York Registration HTS6969, to include but not limited to the onboard Infotainment system, the built in GPS navigation/Hard disk drive, any and all paperwork, documents, bags, luggage, personal billfolds, processing devices which includes electronic devices located within the above mentioned vehicle." An exhibit to the search warrant application included a consent, signed by the defendant and his brother, and notarized by the defendant's attorney, Lee Kindlon. This consent authorized a search of "any articles, open or sealed, located in any part of the inside or outside of said vehicle [2010 Infiniti QX56, 4TS69769]." . . .

28. Pursuant to the search warrant, NYSP Investigator Erika Hock and other members of the New York State Police retrieved numerous items from the Infiniti. One of the items found inside the vehicle was a crumpled up white paper item with what appeared to be red writing on it . . . (emphasis supplied). Believing that the item was a removed or peeled-off DOT sticker, Investigator Hock submitted the item to the NYSP Forensic Identification Unit.
29. I am informed by Senior Investigator Kelly Strack that the above evidence, subsequently described as “pieces of white torn paper/sticker with red printing,” was collected by Investigator Sean Ryan and given evidence item number P3AA1. The item was then transmitted it [sic] to the NYSP Forensic Investigation Center, where Forensic Scientist III Peter J. Lewis performed a forensic DNA analysis. The profile found on the item was “consistent with DNA from an unknown male donor, “John Doe.” This profile can be used for comparison purposes in the event that additional evidence and/or reference samples are submitted in his case.” I am further informed by Senior Investigator Strack that DNA testing can be performed on samples of the defendant’s saliva, containing buccal cells (cheek epithelial cells), and that these cells may be obtained by swabbing the interior of the defendant’s mouth cavity between the cheek and the teeth, with cotton swabs.
30. There is a clear indication that ordering the defendant to supply a sample of his saliva will yield substantial probative evidence. . . . I am informed by Senior Investigator Strack that samples of the defendant’s saliva, containing buccal cells, can be submitted for testing whereby the DNA alleles present in his saliva can be determined. Those DNA alleles can then be compared to the DNA alleles in the biological material found in item P3AA. A conclusion can then be drawn as to whether the defendant is a contributor to the mixtures described above.

(District Attorney’s Affirmation in support of Application).

Defendant's Argument

Defendant opposes the application, contending that the “People have failed to meet their burden of establishing a clear indication that the buccal swab sample sought in the matter will yield substantial probative evidence” (p. 1, Defendant’s Memorandum of Law). Specifically, defendant asserts that the People have failed to explain “how, even if established, defendant’s removal of the recovered DOT sticker would possibly qualify as a ‘sufficiently direct cause’ of the limousine accident and related deaths” (p. 6, Defendant’s Memorandum of Law). In this regard, defendant states that “the alleged removal of the DOT sticker would have, in no way, shape or form, constituted a sufficient direct cause of the accident” (*id.*) Defendant argues that the People’s expert found that the accident was caused by catastrophic brake failure experienced by the limousine; and, since the People do not allege that any of the putative violations caused catastrophic brake failure, the out of service sticker has no relevance to causation of the accident (p. 7, Defendant’s Memorandum of Law).

Discussion

In Matter of Abe A., the Court of Appeals held that a court order, such as requested here, to obtain a bodily sample from a suspect may be issued only where the People establish, “(1) probable cause to believe the suspect has committed the

crime, (2) a clear indication that relevant evidence will be found, and (3) the method used to secure it is safe and reliable” (56 N.Y.2d 288, 291).

The Grand Jury indictment in this case provides the requisite probable cause to satisfy requirement number 1 above (*see, People v. Roshia*, 133 A.D.3d 1029, 1030, affirmed 28 NY3d 989); and, as defendant does not take issue with the safety and reliability of the method used to secure the sample, requirement 3 is satisfied.

This leaves us with requirement 2 set forth in *Matter of Abe A.* (*supra.*). As detailed above, defendant contends that the alleged removal of the DOT Out of Service sticker did to cause the tragic accident and accordingly, even if established, defendant’s removal of the sticker, could not provide relevant evidence.

Defendant’s contention however fails to address the issue of recklessness and criminal negligence, elements of the charged crimes.¹

¹ Penal Law §125.15, Manslaughter in the Second Degree provides *inter alia*, that “a person is guilty of manslaughter in the second degree when he recklessly causes the death of another person” (Emphasis supplied).

Penal Law §125.10, Criminally Negligent Homicide provides “a person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person” (Emphasis supplied).

If the People are able to establish that defendant removed a sticker that not only told him but would have warned repair shops, the limousine driver and passengers that the limousine was not permitted on the road, such evidence is clearly relevant to the elements of recklessness and criminal negligence, elements of the charged crimes.

The People's application is granted.

Defense counsel shall make arrangements with the District Attorney to insure that defendant submits to the taking of saliva and buccal cell sample from his body on or before June 27, 2019.

SO ORDERED

Dated: June 17, 2019


George R. Bartlett, III, J.C.C.

TO: Hon. Susan Mallery, Esq.
Lee Kindlon, Esq.
Tacopina & Seigel, Esq.

6-17-19
KLM